91-1878

Supreme Court, U.S.
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No. 91- _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

MICHAEL MONK

Petitioner,

v.

A. L. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS

Respondent.

Petition for Writ Of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petition for Habeas Corpus should be granted where Petitioner was denied jury instruction on lesser included offense because instruction was not submitted to the court before trial when the basis for the instruction was the testimony of a prosecution witness who was not identified to the defense until the day of trial?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

ARGUMENT 5

CONCLUSION 7

APPENDIX 1a

Appendix A: February 21, 1992, Judgment of the United States Court of of Appeals, Eighth Circuit . . . 1a

Appendix B: July 19, 1991, Judgment of the United States District Court, Eastern District of Arkansas 3a

Appendix C: July 18, 1991, Order of the United States District Court, Eastern District of Arkansas 4a

Appendix D: Proposed Findings and Recommendations of United States Magistrate 5a

Appendix E: May 30, 1989, Order of the Supreme Court of Arkansas 23a

Appendix F: November 9, 1988, Judgment of the Arkansas Court of Appeals 30a

Appendix G: Portion of Trial Transcript from February 16, 1987, trial in Circuit Court, Ouachita County, Arkansas 39a

TABLE OF AUTHORITIES

CASES:

Wainwright v. Sykes
433 U.S. 72 (1977) 5

Murray v. Carrier
477 U.S. 478, (1986) 5

United States v. Valenzuela-Bernal
458 U.S. 858 (1982) 6

Doby v. State
290 Ark. 408, 720 S.W.2d 694 (1986) 6

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

MICHAEL MONK

Petitioner,

v.

A. L. LOCKHART, DIRECTOR, ARKANSAS
DEPARTMENT OF CORRECTIONS

Respondent.

**Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

OPINIONS BELOW

The judgment of the Eighth Circuit Court of Appeals (App. p. 1a) affirming the judgment of the district court is unreported. The judgment of the United States District Court for the Eastern District of Arkansas (App. p.3a) is unreported. The magistrate's Proposed Findings and Recommendations (App. p. 5a) are also unreported.

The decision of the Supreme Court of Arkansas denying post conviction relief (App. p. 23a) is unreported. The opinion of the Arkansas Court of Appeals affirming the

Petitioner's conviction (App. p. 23a) is unreported. The decision of the Circuit Court of Ouachita County is also unreported.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on February 21, 1992. The jurisdiction of this Court rests on 28 U.S.C. §§ 1254(1) and 2254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States, Section 1 provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"

Title 28 of the United States Code, Section 2254(a) provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Arkansas Code Annotated Section 5-12-102 provides in relevant part:

> (a) A person commits robbery if, with the purpose of committing a felony or misdemeanor theft or resisting apprehension immediately thereafter, he employs or threatens to immediately employ physical force upon another.

Arkansas Code Annotated Section 5-12-103 provides in relevant part:

> (a) A person commits aggravated robbery if he commits robbery as defined in section 5-12-102, and he:
> (1) Is armed with a deadly weapon . . .

STATEMENT OF THE CASE

On July 18, 1986, a robbery occurred at the Junior Food Mart in Camden, Arkansas. The cashier on duty at the time of the robbery was Diane Thompson. Ms. Thompson's testimony was that at approximately 4:30 a.m. a boy jumped over the counter, grabbed her hair, placed her in a headlock and demanded that she open the cash register. According to Ms. Thompson, the robber was armed with a knife. The robber took approximately $100.00 from the cash register and from a cigar box kept under the counter, jumped back over the counter, and ran out of the store.

After Ms. Thompson reported the robbery, police arrived at the scene and recovered a knife. The same day, the detective in charge of the investigation showed Ms. Thompson between five and six hundred photographs of possible suspects and she pointed out at least two mug shots, one of which depicted Michael Monk.

On August 27, 1986, Michael Monk entered the convenience store which had been robbed, and Diane Thompson was there. Another store employee whispered to Ms. Thompson and pointed towards Michael Monk. Upon looking at Michael Monk, Ms. Thompson recognized him as the robber and called the police who arrested him upon her identification.

On February 16, 1987, Michael Monk was tried in the Ouachita County Circuit Court, in the Thirteenth Judicial District of Arkansas and convicted of the crime of Aggravated Robbery. During the course of the trial, Ms. Thompson was shown the knife recovered at the scene of the robbery and she testified that it definitely was not the knife used in the robbery. In addition, the prosecution called as a witness an individual named Kentrell Hill who

testified that he was an eye witness to the robbery and that he did not see any kind of weapon. Mr. Monk's defense counsel was not furnished with Mr. Hill's name or notified of his testimony until the morning of the trial despite a previously filed motion for discovery.

Based upon Kentrell Hill's testimony that he witnessed the robbery and did not see any kind of weapon, Michael Monk's trial counsel requested that an instruction be given the jury on the lesser included offense of Robbery (App. p. 40a). The court denied counsel's motion to include such an instruction on the ground that counsel had failed to prepare and submit an instruction on this offense prior to trial (App. p. 41a).

Michael Monk appealed his conviction of Aggravated Robbery to the Arkansas Court of Appeals. One of the issues Mr. Monk raised on appeal was that the jury should have been instructed on the lesser included offense of Robbery. The Arkansas Court of Appeals affirmed the conviction on November 9, 1988. With respect to Michael Monk's argument that the jury should have been instructed on the lesser included offense of Robbery, the court found that Mr. Monk was "precluded from having this argument decided on its merits because he did not prepare and offer a proper written instruction" (App. p. 36a). After his conviction was affirmed by the Arkansas Court of Appeals, Michael Monk sought permission from the Supreme Court of Arkansas to pursue post-conviction relief. On May 30, 1989, the court denied his petition (App. p. 23a).

On July 9, 1990, Michael Monk, then an inmate in a facility of the Arkansas Department of Correction, filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Arkansas. Mr. Monk, and later his court-appointed counsel, challenged the Arkansas trial court's failure to instruct the jury on the lesser included offense of Robbery. The federal magistrate to whom the petition was referred found that Monk had procedurally defaulted on this issue because his trial counsel had not prepared an instruction and submitted it to the Court. Because the Petitioner had not shown cause for this default, the magistrate held, the court could not consider the claim (App. p. 12a) (citing Wainwright v. Sykes, 433 U.S. 72 (1977)). On July 18, 1991, the District Court entered an Order (App. p. 4a) which adopted

the Magistrate's recommended disposition, and a Judgment (App. p. 3a) which dismissed Michael Monk's Petition for Writ of Habeas Corpus.

The Petitioner, by his new appointed counsel, appealed the District Court's dismissal to the Eighth Circuit Court of Appeals. On February 21, 1992, the Eighth Circuit affirmed the District Court's decision (App. p. 1a).

ARGUMENT

This Court should grant this Petition for Writ of Certiorari because the "cause and prejudice" test of Wainwright v. Sykes, 433 U.S. 72 (1977), obviously was satisfied on the facts of this case, and the prejudice caused the Petitioner amounted to a denial of due process of law.

In Wainwright, this Court held that the federal courts would not grant habeas relief where claims had been forfeited in state court by procedural default unless the petitioner could show cause for the procedural default and prejudice resulting from the state court's refusal to hear the claim on its merits. Contrary to the lower courts' decisions, Michael Monk has shown cause and prejudice and should have been permitted to argue that the trial court erred in refusing his request for an instruction on the lesser included offense of Robbery.

The cause for Petitioner's procedural default in state court was that the State itself did not furnish the name of witness Kentrell Hill to the defense until the morning of the trial. See Murray v. Carrier, 477 U.S. 478, 488 (1986) ("we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable, would constitute cause under this standard.") (citations omitted). The Petitioner objected to the admission of the testimony on the grounds that the State had not complied with the previously filed discovery motion, and based on Kentrell Hill's testimony requested an instruction on the offense of Robbery.

Because the identity of this witness was not disclosed by the state until the morning of the trial, neither Michael

Monk nor his trial counsel had any reason to anticipate the need for submitting an instruction on the offense of Robbery. Indeed, there could have been no "rational basis," see Doby v. State, 290 Ark. 408, 414, 720 S.W.2d 694 (1986), for an instruction on the lesser included offense of Robbery until the testimony of Kentrell Hill. It is inconceivable to think that, in advance of trial, an accused or his counsel must submit an instruction on every crime about which undisclosed witnesses of the state may testify. Accordingly, the District Court and the Eighth Circuit Court of Appeals erred in failing to find that cause existed for Michael Monk's failure to submit an instruction on the offense of Robbery.

Despite Kentrell Hill's testimony and defense counsel's motion to submit an instruction on the lesser included offense, no such instruction was given. The failure to give such an instruction restricted the jury's ability to do justice: it precluded the jury from finding the Petitioner guilty, in light of the evidence, of the offense of Robbery instead of Aggravated Robbery as an alternative to a verdict of not guilty. A jury placed in this position cannot reach the verdict that may be the most appropriate, guilty of Robbery. Furthermore, where there is strong evidence of a crime, a jury is likely to be biased against acquittal even if the crime for which the jury would like to convict is less serious than the crime with which the defendant is charged. Because of the trial court's refusal to submit the jury instruction on the offense of robbery, the jury was deprived of the ability to reach a fair result. Thus, the trial was rendered fundamentally unfair, and the Petitioner was denied due process of law. See United States v. Valenzuela-Bernal, 458 U.S. 858, 872 (1982) ("Due process guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice.'" (quoting Lisenba v. California, 314 U.S. 219, 236 (1941))).

CONCLUSION

For the reasons discussed above, this Petition for Certiorari to the Eighth Circuit Court of Appeals should be granted.

Respectfully submitted,

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Counsel for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 91-2936

Michael Monk,	*	
	*	
Plaintiff - Appellant,	*	Appeal from the United States District Court
	*	
v.	*	for the Eastern District of Arkansas.
	*	
A. L. Lockhart, Director, Arkansas Department of Correction,	*	[UNPUBLISHED]
	*	
	*	
Defendant - Appellee.	*	

Submitted: January 10, 1992

Filed: February 21, 1992

Before JOHN R. GIBSON, BOWMAN, Circuit Judges, and LIMBAUGH,* District Judge.

PER CURIAM.

*THE HONORABLE STEPHEN N. LIMBAUGH, United States District Judge for the Eastern District of Missouri, sitting by designation.

Michael Monk appeals the judgment of the District Court[1] denying his petition for writ of habeas corpus under 28 U.S.C. § 2254 (1988). Monk was convicted of aggravated robbery in Arkansas state court. His conviction was upheld by the Arkansas Court of Appeals, and the Supreme Court of Arkansas denied his request for review. After reviewing the record and the arguments raised by Monk, we conclude that the District Court properly denied Monk's habeas petition.

Accordingly, we affirm. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[1]The Honorable Susan W. Wright, United States District Judge for the Eastern District of Arkansas.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

MICHAEL MONK — PETITIONER

VS. NO. PB-C-90-350

A. L. LOCKHART, Director
Arkansas Department of Correction — RESPONDENT

JUDGMENT

In accordance with the Court's Order entered this date, judgment is hereby entered dismissing Petitioner's petition for writ of habeas corpus. The relief sought is denied.

IT IS SO ORDERED this 18th day of July, 1991.

/s/ Susan Webber Wright
UNITED STATES DISTRICT JUDGE

THIS DOCUMENT ENTERED ON DOCKET SHEET
IN COMPLIANCE WITH RULE 58 AND/OR 79(a)
FRCP ON 7-18-91 BY [initials]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

MICHAEL MONK — PETITIONER

VS. NO. PB-C-90-350

A. L. LOCKHART, Director — RESPONDENT
Arkansas Department of Correction

ORDER

The Court has received proposed Findings and Recommendations from Magistrate Judge Jerry Cavaneau. After careful review of those findings and recommendations, and the timely objections received thereto, the Court concludes that the Findings and Recommendations should be, and hereby are, approved and adopted as this Court's findings in all respects in their entirety.

Accordingly, judgment will be entered dismissing this complaint.

IT IS SO ORDERED this 18th day of July, 1991.

/s/ Susan Webber Wright
UNITED STATES DISTRICT JUDGE

THIS DOCUMENT ENTERED ON DOCKET SHEET
IN COMPLIANCE WITH RULE 58 AND/OR 79(a)
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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

MICHAEL MONK — PETITIONER

VS. — NO. PB-C-90-350

A. L. LOCKHART, Director — RESPONDENT
Arkansas Department of Correction

PROPOSED FINDINGS AND RECOMMENDATIONS

Michael Monk, an inmate in custody of the Arkansas Department of Correction, seeks a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner was convicted of aggravated robbery by a jury in the Ouachita County, Arkansas, Circuit Court and sentenced to twenty years imprisonment in the Arkansas Department of Correction. His conviction and sentence were affirmed on direct appeal by the Arkansas Court of Appeals. Monk v. State, No. CACR 87-222, slip op. (November 9, 1988). Thereafter, the Arkansas Supreme Court denied petitioner's request to proceed under Rule 37 of the Arkansas Rules of Criminal Procedure. Monk v. State, No. CR 89-62, slip op. (Ark. S. Ct. May 30, 1989) (per curiam). Petitioner now seeks a

writ of habeas corpus in this Court and advances the following grounds for relief:[1]

> 1. The state violated the rule against double jeopardy by prosecuting petitioner for the crimes of third degree battery and aggravated robbery, both of which arose out of the same incident;
>
> 2. Trial counsel was ineffective in failing to pursue a double jeopardy defense;
>
> 3. The trial court erred in refusing petitioner's motion for an instruction on the lesser included offense of robbery;
>
> 4. The trial court erred in failing to suppress evidence that was not disclosed to the defense in violation of the discovery rules;
>
> 5. The trial court erred in failing to suppress the victim's in-court identification;
>
> 6. The trial court erred in receiving into evidence testimony and tangible evidence concerning items recovered at the crime scene on the basis that they were incompetent; and
>
> 7. There was insufficient evidence to support the jury's verdict that petitioner committed the aggravated robbery.

After careful consideration, the Magistrate Judge finds each of the grounds advanced by petitioner to be without merit and, therefore, recommends that this petition for writ of habeas corpus be dismissed.

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[1]Respondent stipulates that petitioner has exhausted his state court remedies.

As a preliminary matter, the Court notes that the factual findings of the state court concerning the issues raised by petitioner shall be presumed to be correct pursuant to 28 U.S.C. § 2254 (d).

> [T]he findings made by the state-court system "shall be presumed to be correct" unless one of seven conditions specifically set forth in § 2254 (d) was found to exist by the federal habeas court. If none of those seven conditions were found to exist, or unless the habeas court concludes that the relevant state court determination is not "fairly supported by the record," "the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the state court was erroneous." (Emphasis supplied.)

Sumner v. Mata, 449 U.S. 539, 550 (1981). Any rejection of the state court factual findings must be accompanied by a statement explaining the habeas court's reasoning, in terms of the conditions listed in § 2254 (d). Id. at 551-552. A federal court may not redetermine the credibility of witnesses when the state court's determination is fairly supported by the record. Miller v. Fenton, 474 U.S. 104, 114 (1985). "A federal court must more than simply disagree with a state court before rejecting its factual determination. Rather, a federal court must conclude that a state court's findings lack "even 'fair support' in the

record." Woods v. Armontrout, 787 F.2d 310, 313 (8th Cir. 1986), cert. denied, 479 U.S. 1036 (1987).

Petitioner does not assert that any of the seven conditions listed in § 2254 (d) are present in his case and this Court finds the factual determinations made by the state court are fairly supported by the record. Thus, the presumption applies.

I. DOUBLE JEOPARDY

Petitioner argues his trial on the charges of aggravated robbery violated the prohibition against double jeopardy because he had already been convicted of third degree battery from actions arising out of the same incident.[2] Respondent contends petitioner did not raise the issue of double jeopardy at trial, and that he has therefore procedurally defaulted on this issue. The Arkansas Court of Appeals declined to address the issue in petitioner's direct appeal because no objection was made in the trial court. Monk v. State, No. CACR 87-222, slip op. at 3. This Court has reviewed the record and agrees petitioner

[2]The Double Jeopardy Clause, made applicable to the States by the Fourteenth Amendment, Benton v. Maryland, 395 U.S. 784, 794 (1969), provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amendt. 5.

did not raise the issue of double jeopardy in his trial, and that he has not shown cause for this procedural default.

> A habeas petitioner may not raise a constitutional claim in the federal court that he has not raised in state court proceedings unless he can demonstrate adequate cause as to why he failed to raise the claim in the state court and show that actual prejudice resulted from the error of which he complains. Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

Chambers v. Lockhart, 872 F.2d 274, 276 (8th Cir.), cert. denied, 110 S.Ct. 335 (1989). Petitioner has not shown cause for this procedural default and, accordingly, is not entitled to relief on this issue.

Even if petitioner had properly raised this issue, he would not be entitled to relief since third degree battery is not a lesser included offense of aggravated robbery, and convictions for both do not violate the prohibition against double jeopardy.[3] A person commits aggravated robbery in Arkansas if, pertinent to this case,[4] he commits robbery

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[3]The robbery in question occurred on July 18, 1986. Petitioner was arrested on August 27, 1986, after he entered the store that was robbed and was recognized by the victim. Although it is not apparent from the record, petitioner was apparently convicted of third degree battery in Municipal Court as a result of the incident on July 18, 1986. He was later tried and convicted in circuit court on a charge of aggravated robbery stemming from the same July 18, 1986, incident.

[4]The information alleged that on July 18, 1986, "Michael Monk aka Al Capone . . . did unlawfully, committ [sic] a robbery of the Jr. Food Mart of Camden, Arkansa[s] while being armed with a deadly weapon, a large butcher knife" (Tr. 2).

and is armed with a deadly weapon, Ark. Code Ann. § 5-12-503 (1987) [Ark. Stat. Ann. § 41-2102 (Repl. 1977)], while a person commits third degree battery if he purposely causes physical injury to another person. Ark. Code Ann. § 5-13-203 (1987) [Ark. Stat. Ann. § 41-1603 (Repl. 1977)]. Third degree battery is thus distinguishable from aggravated robbery in that the battery offense requires physical injury to another while aggravated robbery does not. Moreover, aggravated robbery requires the purpose of committing robbery[5] and being armed with a deadly weapon, while the battery offense requires neither of these two elements. Each offense by statutory definition "requires proof of an additional fact which the other does not" and, thus, are not the same offense for double jeopardy purposes. Blockburger v. United States, 284 U.S. 299, 304 (1932). Cf. Grady v. Corbin, 110 S.Ct. 2084 (1990).

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner argues his trial counsel was ineffective for failing to conduct a reasonable investigation that would

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[5]A person commits robbery "if with the purpose of committing a [felony or misdemeanor] theft . . . he employs or threatens to immediately employ physical force upon another." Ark. Code Ann. § 5-12-102 (supp. 1989) [Ark. Stat. Ann. § 41-2103(1) (Repl. 1977)].

have "proved issues for double jeopardy." He argues that had defense counsel raised the issue of double jeopardy, there is a reasonable probability that he would not have gone to trial for the offense of aggravated robbery.

This Court considers petitioner's claim of ineffective assistance of counsel under the two-part test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Petitioner must show "counsel's representation fell below an objective standard of reasonableness," id. at 688, and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, id. at 694.

Petitioner is not entitled to relief on the basis of ineffective assistance of counsel since there is no merit to his double jeopardy argument. Since the claim of double jeopardy is without merit, so is the ineffective assistance claim; it cannot be ineffective assistance not to raise a meritless argument. Larson v. United States, 833 F.2d 758, 759 (8th Cir. 1987), cert. denied, 486 U.S. 1008 (1988).

III. INSTRUCTION ON LESSER INCLUDED OFFENSE

Petitioner argues that the trial court erred in refusing to instruct the jury on the lesser included offense of

robbery. He contends that the evidence at trial did not establish that a weapon was used in the alleged crime, and that the state therefore did not prove all of the necessary elements of aggravated robbery beyond a reasonable doubt: Respondent contends that petitioner has procedurally defaulted on this issue since he did not prepare a correct instruction and submit it to the Court (although he did move for such an instruction). Indeed, the Arkansas Court of Appeals, citing Wood v. State, 20 Ark. App. 61, 724 S.W.2d 183 (1987), found that petitioner was precluded from having this issue decided on its merits because he did not prepare and offer a proper written instruction. Monk v. State, No. CACR 87-222, slip op. at 4. Because petitioner has not shown cause for this procedural default, this Court may not consider his claim. Wainwright v. Sykes, 433 U.S. 72 (1977).

Even if petitioner had properly raised this issue in state court, however, the Court notes that improper jury instructions do not generally form a basis for federal habeas corpus relief. Amos v. State of Minnesota, 849 F.2d 1070, 1073 (8th Cir.), cert. denied, 488 U.S. 861 (1988). Habeas relief is only available where "the error constitutes a fundamental defect that resulted in a

complete miscarriage of justice or so infected the entire trial as to deprive the defendant of a fair trial." Id. (quoting Berrisford v. Wood, 826 F.2d 747, 752 (8th Cir. 1987), cert. denied, 484 U.S. 1016 (1988)). Here, there was no rational basis for the trial court to instruct the jury on the lesser included offense of robbery since petitioner denied committing the offense and, thus, was either guilty of aggravated robbery or was not guilty of anything. See e.g., Doby v. State, 290 Ark. 408, 720 S.W.2d 694 (1986).

IV. FAILURE TO DISCLOSE EVIDENCE

Petitioner claims that the name of a witness for the prosecution, Kentrell Hill, was not furnished to the defense until the morning of trial. He also claims that a photograph of him that was allegedly picked out of a photo-lineup was not disclosed to the defense pursuant to his motion for discovery, a violation of Ark. R. Cr. P. 17.1.

To the extent petitioner is merely pointing to the violation of the discovery rules as grounds for habeas relief, such an allegation amounts only to a violation of state law and is not cognizable under § 2254. Engle v. Isaac, 456 U.S. 107, 119-21 (1982). Nevertheless, the failure of a state to afford a particular defendant the benefit of

established procedures under state law may result in a denial of due process when the error made by the state court renders the state proceedings so "fundamentally unfair or so fundamentally deficient that they are inconsistent with the rudimentary demands of fair procedure." Klimas v. Mabry, 599 F.2d 842, 848 (8th Cir. 1979), rev'd on other grounds, 448 U.S. 444 (1980) (citations omitted).

The record in this case does not show a denial of due process. In United States v. Bagley, 473 U.S. 667 (1985), the Supreme Court held that evidence in nondisclosure cases is material only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Id. See also United States v. Peltier, 800 F.2d 772, 774-775 (8th Cir. 1986), cert. denied, 484 U.S. 822 (1987).

Considering the evidence against petitioner, there is not a reasonable probability that had the evidence in question been disclosed to the defense, the result of the

proceeding would have been different.[6] It need only be pointed out that Diane Thompson, the victim of the robbery, was unequivocal in her identification of petitioner as the individual who committed the robbery (Tr. 76-78). In that respect, both the photograph and the testimony of Hill merely provided evidence that was cumulative to her testimony. In any event, the record does not show petitioner was denied an ample opportunity to meet the case of the prosecution since counsel offered two witnesses who challenged Hill's testimony that he saw petitioner run from the store on the night in question (Tr. 171-174). Petitioner simply has not shown any prejudice that would entitle him to relief on this issue.

V. IN-COURT IDENTIFICATION

Petitioner states that the identification of him as the alleged robber was "patently unreliable." He argues that Thompson testified that the robber had no facial hair, while Sherie Oliver, an employee of the food mart at the time, testified that she saw petitioner on the parking lot of the

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[6]The Court notes that Hill was not known to the state until a week before trial, and it was not known what he would testify to at that time (Tr. 132). Likewise, the state was not aware of the existence of the photograph until the day of trial (Tr. 120). The trial court offered the defense a one week continuance in order to make use of Hill's testimony, but the defense refused, insisting instead that the testimony be excluded (Tr. 137).

store the night of the alleged robbery and that he had facial hair. Petitioner further argues that Officer Dunn testified that the description given by Thompson, the only person present during the robbery, did not fit petitioner's description regarding facial hair.

Reliability is the linchpin in determining the admissibility of identification testimony. Manson v. Brathwaite, 432 U.S. 98, 114 (1977). The factors to be considered in determining reliability include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself." Id.

The crime in question occurred on July 18, 1986, and came to trial less than seven months later, on February 16, 1987. At the trial, Diane Thompson testified that an individual with a towel around his face jumped over the counter, put her in a headlock, and said "open the register" (Tr. 77-79). She testified that the towel fell off his face during the "hustle and everything," and that she saw his

face "several times" (Tr. 78). Petitioner was arrested on August 27, 1986, after he again entered the store and was recognized by Thompson as the robber (Tr. 89). Thompson noted that petitioner, who was wearing a "loud flowerdy shirt," had "oily," "curly" hair at the time of the robbery, and she positively identified petitioner in the courtroom as the individual who robbed her (Tr. 77-79). Her description of the robber was corroborated by Sherie Oliver who testified that she saw petitioner in the parking lot of the store on the night of the robbery wearing a "white flowered shirt" with his hair in a "greasy curl" (Tr. 65, 70, 167). Additionally, Kentrell Hill testified that he went to the store to get some cigarettes and saw a man and a girl behind the counter. He testified that he saw petitioner, who he stated he had known as "Al Capone" for some 11 or 12 years, coming out of the store shortly thereafter (Tr. 140). Detective Dunn testified that Thompson went through five or six hundred photographs and picked an old photograph of petitioner as the individual who robbed her (Tr. 105, 120).

Thompson was unequivocal in her identification of petitioner as the robber, and the Court finds nothing impermissibly suggestive about the identification procedures

employed in this case. Petitioner is not entitled to relief on this issue.

VI. ADMISSION OF EVIDENCE

Petitioner contends the jury was allowed to consider evidence that was never identified by the state's chief witness. He argues a knife was produced by the state which Thompson said was not the knife used in the transaction but that the Court, while not admitting this knife into evidence, nevertheless allowed testimony about the knife from a subsequent witness, Officer Dunn. Petitioner further argues Thompson could not positively identify a towel or bandanna allegedly worn by the robber, but that the Court allowed those items to be admitted into evidence, without objection by defense counsel. Petitioner argues the knife, towel, and bandanna created prejudice and should be ruled incompetent evidence. He notes that the court did nothing to correct the error such as instruct the jury not to consider the evidence, and that defense counsel did not ask that the case be removed from the jury.

Questions relating to the admissibility of evidence are matters of state law and generally are not cognizable in an action for habeas corpus. Wood v. Lockhart, 809 F.2d

457, 459-60 (8th Cir. 1987). Nevertheless, evidentiary matters will give rise to habeas relief where the asserted error resulted in a denial of due process. Id. See also Moore v. Wyrick, 760 F.2d 884, 886 (8th Cir. 1985). To prove such denial, petitioner must show the error was "of such magnitude as to deny fundamental fairness to the criminal trial." Warden v. Wyrick, 770 F.2d 112, 116 (8th Cir.), cert. denied, 474 U.S. 1035 (1985). See also Wood v. Lockhart, 809 F.2d at 460 (error must be such that it "fatally infected the trial and failed to afford petitioner the fundamental fairness which is the essence of due process").

Even assuming the trial court erred in the manner asserted, petitioner has not demonstrated prejudice. Diane Thompson was unequivocal in her testimony that on July 18, 1986, petitioner entered the Jr. Food Mart armed with a knife, grabbed her by the hair, and placed her in a headlock. She states that he demanded that she open the cash register, and that he then took some money and fled the scene (Tr. 76-78). Any hesitancy exhibited by

Thompson with respect to the items entered into evidence was a question for the jury to resolve.[7]

VII. SUFFICIENCY OF THE EVIDENCE

Petitioner argues that the testimony presented at the trial left a reasonable doubt as to issues such as (1) the identity of the alleged robber; (2) whether or not a weapon was used in the commission of the alleged robbery; (3) why the store employees, in discussing the robbery, did not tell police they suspected the petitioner; (4) that the testimony had been changed by some of the witnesses after they conversed while sequestered from the trial; and (5) whether or not the towel and bandanna possessed by the alleged robber was the same since they could not be identified by the only person present at the time of the alleged robbery.

This court is not a "second trier of fact," and may not substitute its judgment for that of the trial court. Sullivan v. Minnesota, 818 F.2d 664, 666 (8th Cir.), cert. denied, 484 U.S. 862 (1987). Rather, petitioner will be entitled to

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[7]To the extent petitioner is arguing ineffective assistance of counsel, the Court notes that even if "counsel's representation fell below an objective standard of reasonableness," Strickland v. Washington, 466 U.S. at 688, petitioner has not shown that there is a reasonable probability that, "but for counsel's unprofessional errors, the result of the proceeding would have been different," id. at 694.

habeas corpus relief only if it is found that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Id. at 666 See also Jackson v. Virginia, 443 U.S. 307, 324 (1978). Given the nature of the evidence in this case, the Court has no hesitation in finding sufficient evidence to support petitioner's conviction of aggravated robbery.

As previously noted, Sherie Oliver testified that she saw petitioner, whose hair she described as being in a "greasy curl," in the parking lot of the store on the night of the robbery. Diane Thompson testified that an individual with a towel around his face and a "large knife" jumped over the counter, put her in a headlock, and said "open the register." She testified that the towel fell off his face during the "hustle and everything," and that she saw his face "several times." Thompson noted that petitioner had "oily," "curly" hair at the time of the robbery, and she positively identified petitioner in the courtroom as the individual who robbed her.

The Arkansas Court of Appeals stated the following in finding sufficient evidence to support the jury's verdict:

> Appellant's argument focuses on contradictions between the testimony of some of the witnesses, such as one witness's description of appellant as

> having facial hair on the night of the robbery, while the robbery victim described the robber as lacking facial hair. The Supreme Court of Arkansas has restated the principle that the jury decides what weight to give the witnesses' testimony; the jury is the fact finder. See Williams v. State, 295 Ark. 18, 746 S.W.2d 44 (1988).

Monk v. State, No. CACR 87-222, slip op. at 2. This Court agrees and concludes that a rational trier of fact could have found beyond a reasonable doubt that on July 18, 1986, petitioner "did unlawfully committ [sic] a robbery of the Jr. Food Mart of Camden, Arkansa[s] while being armed with a deadly weapon, a large butcher knife" (Tr. 2).

VIII. CONCLUSION

The Magistrate Judge finds each of the grounds advanced by petitioner to be without merit and, therefore, recommends that his petition for writ of habeas corpus be dismissed, and the relief sought, denied.

Dated this 3rd day of July, 1991.

/s/ Jerry Cavaneau
UNITED STATES MAGISTRATE JUDGE

SUPREME COURT OF ARKANSAS

No. CR 89-62

MICHAEL MONK, A/K/A AL CAPONE Petitioner	*	PETITION TO PROCEED IN THE CIRCUIT COURT OF OUACHITA COUNTY, (CR 86-181), PURSUANT TO CRIMINAL PROCEDURE RULE 37
v.	*	
STATE OF ARKANSAS Respondent	*	PETITION DENIED May 30, 1989

Per Curiam

The petitioner Michael Monk was convicted of aggravated robbery and sentenced to twenty years in prison. His conviction was affirmed by the Court of Appeals in an opinion not designated for publication. Monk v. State, CACR 87-222 (November 9, 1988). The petitioner now seeks to proceed in circuit court for post-conviction relief pursuant to Criminal Procedure Rule 37.

The petitioner was convicted of robbing a convenience store. Juanita Diane Thompson, a store employee, was behind the counter when a man jumped over, grabbed her hair, and while holding her and threatening her with a knife, demanded the cash register be opened. Thompson was

able to see her assailant's face. He took some money from the cash register and another $100 kept in a cigar box, and fled. After the police arrived, Thompson looked at several hundred photographs of possible suspects. She picked out at least two men, one of which was the petitioner. At that point she was unable to positively identify a suspect. A little more than a month later, another store employee directed Thompson's attention to the petitioner, who had come in the store. Thompson recognized him as the robber and telephoned the police. The petitioner was arrested.

The petitioner alleges that defense counsel was ineffective in a number of ways. To prevail on a claim of ineffective assistance of counsel, the petitioner must show first that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the sixth amendment. Second, the petitioner must show that the deficient performance prejudiced the defense, which requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. Unless a petitioner makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result

unreliable. A court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The petitioner must show there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt respecting guilt, i.e., the decision reached would have been different absent the errors. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. In making a determination on a claim of ineffectiveness, the totality of the evidence before the judge or jury must be considered. Strickland v. Washington, 466 U.S. 668 (1984).

The petitioner claims that the conviction for aggravated robbery violates the prohibition against double jeopardy because he had already been convicted of third degree battery of Thompson arising out of the same incident. Although this fact does not appear in the record, the Court of Appeals' opinion acknowledges that the petitioner was tried for and convicted of third degree battery. The petitioner argues now that his attorney was ineffective for failing to produce the municipal court record of his conviction so that the trial court could see that the petitioner had already been convicted for the crime.

This point is meritless because third degree battery is not a lesser included offense of aggravated robbery and convictions for both do not violate double jeopardy. A person commits aggravated robbery if he commits robbery and is armed with a deadly weapon. Ark. Code Ann. § 5-12-103 (1987) [Ark. Stat. Ann. § 41-2102 (Repl. 1977)]. The petitioner's conduct at the convenience store fits within that definition. In order to commit battery in the third degree, the actor must cause physical injury or mental impairment to another person. See Ark. Code Ann. § 5-13-203 (1987) [Ark. Stat. Ann. § 41-1603 (Repl. 1977)]. The petitioner's conduct also fits the definition of third degree battery. The element of injury, however, is missing from the aggravated robbery statute and, therefore, battery in the third degree is not a lesser included offense of aggravated robbery. The petitioner was not put in jeopardy twice for the same offense.

The petitioner alleges next that his attorney was ineffective for not moving to suppress his in-court identification which was patently unreliable. The petitioner states only that he had told his attorney prior to trial that the victim had named another person as her assailant. Even if that assertion were true, there is adequate evidence

to support the conclusion that the victim finally determined that the petitioner was, in fact, the robber. The petitioner has failed to show that defense counsel was ineffective in this respect.

The petitioner makes the clearly specious claim that his attorney was ineffective for admitting during his opening argument that a robbery had been committed because this relieved the state of their burden of proving every element of the crime beyond a reasonable doubt. It is obvious from the record that the state could have proven the fact of the robbery since they had the victim, another employee and a detective testify to the robbery. This allegation attacks defense counsel's choice of trial tactics and does not state a basis for post-conviction relief. Leasure v. State, 254 Ark. 961, 497 S.W.2d 1 (1973).

The petitioner claims next that his counsel failed to submit jury instructions for a lesser included offense. He claims that since the victim testified that the knife found in the store was not the knife her assailant was carrying, he was entitled to an instruction on simple robbery. His counsel moved for such an instruction but the trial court denied the motion because the defense had not submitted the instruction. Since the petitioner claimed at trial that he

did not do the crime, there was no rational basis for the giving the instruction on simple robbery. The petitioner was either guilty of aggravated robbery or nothing at all. Doby v. State, 290 Ark. 408, 720 S.W.2d 694 (1986).

Kentrall Hill testified for the state that he saw the petitioner holding Thompson behind the counter of the convenience store the night of the robbery. When the state called Hill as a witness, defense counsel objected because the state had not given him notice that Hill would be a witness until the morning of the trial. The trial court offered the defense a continuance, but defense counsel refused the offer stating that the only adequate remedy was the exclusion of the testimony. The petitioner claims that his counsel was ineffective for not taking advantage of the offer of the continuance but he does not state how the extra time would have benefitted counsel in further preparing the defense. Since the petitioner has not demonstrated how he was prejudiced, there is no basis for relief.

The victim testified that the robber used a knife and wore a bandanna and towel. The police recovered a knife, bandanna, and towel at the scene but the victim could not identify the bandanna or the towel and said that the knife

recovered was definitely not the one the robber used. The petitioner finally alleges that his attorney was ineffective for failing to ask the trial court for an instruction to the jury that the knife produced at trial but not admitted into evidence, was not the knife used in the robbery and for failing to object to the introduction of the towel and the bandanna. These allegations do not demonstrate any sort of real prejudice in light of the considerable evidence against the petitioner. Even with the instruction and objection sought, it is very unlikely that the result would have been different. Therefore, the petitioner has not shown that his counsel was ineffective in any way.

Petition denied.

DIVISION II
ARKANSAS COURT OF APPEALS

No. CACR 87-222

	*	Opinion Delivered November 9, 1988
MICHAEL MONK, A/K/A Al Capone APPELLANT	*	AN APPEAL FROM THE OUACHITA COUNTY CIRCUIT COURT
V.	*	
STATE OF ARKANSAS APPELLEE	*	THE HONORABLE JOHN GRAVES, CIRCUIT JUDGE
	*	AFFIRMED

BETH GLADDEN COULSON, Judge

A jury convicted appellant, Michael Monk, of aggravated robbery. He was sentenced to twenty years in prison. On appeal, he raises seven points for reversal. We find all of his arguments unpersuasive and affirm.

On July 18, 1986, a robbery occurred at the Jr. Food Mart, a convenience store in Camden. Juanita Diane Thompson, a store employee, was behind the counter about 4:30 a.m., when a man jumped over the counter, grabbed her hair, gripped her in a headlock, and demanded that she open the cash register. Thompson testified that the man was armed with a knife, and that he had a towel wrapped around his face and a bandanna covering his hair.

Both the towel and the bandanna fell off, and Thompson was able to see the man's face. He took some money from the cash register and about $100 that was kept in a cigar box, and he fled.

After Thompson reported the robbery, police arrived and recovered a bandanna, a towel, and a knife from the scene. Police officers showed Thompson several hundred photographs of possible suspects. She picked out at least two of the photographs, one of which represented appellant, but she was unable to positively identify a suspect from the photographs. Sherrie Oliver, the employee whose shift ended when Thompson came to work, told police that appellant was one of several men on the parking lot when she left work the night of the robbery.

On August 27, 1986, appellant entered the Jr. Food Mart while Thompson was working there. Another store employee directed Thompson's attention to appellant. Thompson testified that when she looked up she saw appellant and recognized him as the robber. She telephoned police, and appellant was arrested. Apparently, on a later date, appellant was arrested for a second time and charged with third degree battery in connection with the same incident. He was tried in Camden Municipal

Court and convicted of the battery charge. On February 16, 1987, the State tried appellant before a jury on a charge of aggravated robbery stemming from the July 18, 1986, incident at the store. He was convicted and sentenced to twenty years in prison. From that conviction, he brings this appeal.

The trial court denied appellant's motion for a directed verdict and his arguments for reversal include a challenge to the sufficiency of the evidence. On appeal, this court must review that argument before considering any trial errors. Harris v. State, 284 Ark. 247, 681 S.W.2d 334 (1984). In doing so, we must consider all the evidence, including any which may have been inadmissible, in the light most favorable to appellee. Ashley v. State, 22 Ark. App. 73, 732 S.W.2d 872 (1987).

Appellant's argument focuses on contradictions between the testimony of some of the witnesses, such as one witness's description of appellant as having facial hair on the night of the robbery, while the robbery victim described the robber as lacking facial hair. The Supreme Court of Arkansas has restated the principle that the jury decides what weight to give the witnesses' testimony; the jury is the fact finder. See Williams v. State, 295 Ark. 18,

746 S.W.2d 44 (1988). This court affirms when there is substantial evidence to support the jury's verdict. Turner v. State, 24 Ark. App. 102, 749 S.W.2d 339 (1988). Substantial evidence is evidence that compels a conclusion one way or the other, without resort to speculation or conjecture. Jones v. State, 11 Ark. App. 129, 668 S.W.2d 30 (1984).

We find that sufficient evidence existed in the instant case to support the jury's verdict that appellant was guilty of aggravated robbery. The evidence included the victim's testimony about being robbed by a man armed with a large knife, the recovery of items used in the robbery, and the testimony of a witness who said that appellant was one of several men on the store's parking lot some time before the robbery occurred. Another witness, Kentrell Hill, testified that he looked in the store window and saw a struggle occurring behind the counter. Shortly afterward, he saw appellant flee from the store.

Appellant's second point for reversal is that his jury trial on a charge of aggravated robbery violated the constitutional prohibition against double jeopardy because he was tried in municipal court on the battery charge stemming from the same incident. He has attached to his

brief documents that apparently are records of his conviction in municipal court. We do not reach that issue, however, because no motion to dismiss was presented to the trial court based on this argument, nor was any other proper objection made to the trial court concerning this issue. It is well-settled that the "plain error" doctrine is not recognized in Arkansas; arguments may not be made for the first time on appeal. Williams v. State, 24 Ark. App. 118, 748 S.W.2d 355 (1988).

Appellant's third point is that the trial court erred by not excluding evidence that was not disclosed to him during discovery. Prior to trial appellant had filed a motion for discovery pursuant to Ark. R. Crim. P. 17.1, and the prosecuting attorney was under an ongoing duty to comply with discovery. Ark. R. Crim. P. 19.2. At trial, appellant objected to the testimony of Kentrell Hill because the state did not furnish him with Hill's name until the morning of the trial. The trial court offered appellant a one-week continuance for him to prepare for this witness. Appellant refused to accept the continuance and insisted on exclusion of Hill's testimony. The trial court allowed Hill to testify. His testimony included that he recognized appellant as the man he knew as "Al Capone" when he saw appellant run

from the scene of the robbery. The trial court also admitted into evidence appellant's photograph which the victim had picked out of the photographs shown to her by police. Discovery had not been complied with regarding the photograph because police said they had misplaced the photograph and found it shortly before the trial.

Concerning discovery violations, this court stated in Shuffield v. State, 23 Ark. App. 167, 745 S.W.2d 630 (1988) that where a criminal defendant would be prejudiced by the State's noncompliance, a trial court must act to remove that prejudice. Appropriate action includes granting a continuance, exclusion of the evidence, ordering discovery, or another order tailored to the circumstances. Id. It is within the trial court's sound discretion whether to exclude materials which were not disclosed during discovery, or whether to grant a continuance. See Rubio v. State, 18 Ark. App. 277, 715 S.W.2d 214 (1986). The appellate court will not disturb the trial court's decision absent an abuse of discretion. Id. In the instant case, we hold that the trial court did not abuse its discretion in offering appellant a continuance to remove any prejudice that might result to him.

Fourth, appellant argues that the jury should have been instructed on the lesser included offense of robbery. Appellant contends that because Hill testified that he did not see a knife involved in the struggle inside the store, the jury should have received an instruction on the elements of robbery. We do not reach that issue. Appellant is precluded from having this argument decided on its merits because he did not prepare and offer a proper written instruction. It is well-established that a person appealing a criminal conviction is in no position to argue that a particular instruction should have been given where the appellant failed to submit an instruction to the court. Wood v. State, 20 Ark. App. 61, 724 S.W.2d 183 (1987).

Fifth, appellant argues that the victim's identification of him as the robber was so unreliable that the trial court should have suppressed it or declared it incompetent. Appellant may not argue this point on appeal because he failed to make a timely motion to suppress, and he presented no evidence concerning any cause for delay in filing the motion. A motion to suppress must be filed no later than ten days before the trial date unless the court, for good cause, entertains the motion at a later time. See Fisk v. State, 5 Ark. App. 5, 631 S.W.2d 626 (1982).

Even if appellant had filed a timely motion, we have considered his contentions regarding the unreliability of the identification and find them to be without merit.

For his sixth point, appellant argues that the trial court erred by admitting into evidence the towel and bandanna that police recovered at the scene. Appellant contends that the items were not properly identified for admission into evidence because the victim testified that she was uncertain that they were the actual items used to mask the robber. We do not reach this issue. No objection was made to the trial court concerning the identification of these two items. This court does not consider matters which were not raised before the trial court; this is a settled rule. Williams v. State, 24 Ark. App. 118, 748 S.W.2d 355 (1988); Dillard v. State, 20 Ark. App. 35, 723 S.W.2d 373 (1987).

In another issue connected with his sixth point, appellant contends that the trial court erred in allowing a police officer to testify, over appellant's objection, about the knife that was recovered at the robbery scene. Appellant contends that this evidence was incompetent and should have been suppressed. The question of competency is within the sound discretion of the trial court, and in the

absence of abuse of that discretion or manifest error, this court will not disturb the ruling of the trial court. Chappell v. State, 18 Ark. App. 26, 710 S.W.2d 214 (1986). We see no reason that the trial court should have prohibited the police officer from testifying about what was found at the scene of the robbery. See Harper v. State, 249 Ark. 1013, 462 S.W.2d 847 (1971).

Lastly, appellant argues that he received ineffective assistance of counsel at trial. A claim of ineffective assistance of counsel will not be considered on appeal absent an objection stating such a contention to the trial court. Knappenberger v. State, 278 Ark. 382, 647 S.W.2d 417 (1983); Spivey v. State, 25 Ark. App. 269, ___ S.W.2d ___ (1988). The record reveals that appellant made no such argument to the trial court. He has not submitted a motion for a new trial based on this argument, nor has he filed a petition for post-conviction relief which might be available under Ark. R. Crim. P. 37.

Affirmed.

CRACRAFT and JENNINGS, JJ., agree.

TRANSCRIPT OF TRIAL (EXCLUDING VOIR DIRE) IN OUACHITA COUNTY NO. CR 86-181, ON APPEAL NO CACR 87-222 [PAGES 180-182]

TRIAL DATE: FEBRUARY 16, 1987

PROCEEDINGS OUT OF HEARING OF THE JURY:

THE COURT: All right, Sir, Mr. Honey.

MR. HONEY: If the Court please, the defendant hereby requests an instruction giving the jury the alternative to convict the defendant of simple robbery rather than aggravated robbery based upon the prosecution's own witness Hill's own testimony that he viewed the robbery and did not see a weapon at any time

MR. McLEAN: Your Honor, the victim in this case has state throughout the trial although she could not identify the instrument shown her by the deputy prosecuting attorney, she still maintains that a weapon was brought into this door by the defendant and that he left it inside the store upon his departure from the scene of the robbery. We think that testimony is sufficient to take it to the jury on the question of whether or not this is an aggravated robbery.

The other witness to whom he refers, Kentrell Hill, testifies that he had, he saw something taking place from a vantage point across the street. I would submit that he said as far as he knew there was no weapon. I don't think he testified that there was no weapon, but I submit that his vantage point at some distance from the scene could easily

suggest that he could not have seen or may not very well have seen the weapon, even had there been one, and that his next occasion to see it was at a point when by everybody's testimony the defendant would not have been -- would not have been armed. So we think the only evidence in the record is that this was an aggravated robbery and that the lesser included instruction should not be given.

THE COURT: All right. The motion to include an instruction on the lesser offense of robbery will be denied for the reason stated by the prosecutor that there is no evidence in the record to base a finding of robbery. Further, that the Court's order required instructions be submitted three days prior to trial and no instructions of any kind were submitted by counsel for the defense, plus the fact that counsel for the defense admits in opening statement that the defendant did not argue with regard to the commission of the offense, only that the defendant did not do it. Any other objections?

MR. HONEY: Judge, for my own protection, may I address the record just very quickly. If the Court please, the Court's aware that the defendant's in a position when the defendant doesn't always know what jury instructions

are appropriate until after the testimony is in. Also the --- from the discovery furnished me on the Court's order at my regular request for discovery I have no reason to suspect that there would be any doubt about a weapon, even in my opening statement this morning until the testimony was in, and it now appears that you know from the defendant's own witness, I mean the prosecution's own witness, Mr. Kentrell Hill, that there may not have been a weapon. It also appears from the victim's statement that she was not able to identify a weapon and I would not want any interpretation on the Court's remark in the record that the defendant's counsel had been negligent in not having anticipated that testimony.

THE COURT: Anything further?

ATTORNEYS: No, sir.

THERE WERE NO OBJECTIONS TO THE GIVING OR REFUSAL TO GIVE ANY OF THE INSTRUCTIONS.

THE COURT: READ THE FOLLOWING INSTRUCTIONS TO THE JURY.

AMCI 101 - COURT INSTRUCTION NO. 1

RESPECTIVE DUTIES OF JUDGE AND JURY

CAUTIONARY INSTRUCTIONS.

The faithful performance of your duties as jurors is essential to the administration of justice.

LITTLE ROCK, AR 72201
(501) 376-4660

ATTORNEY FOR RESPONDENT

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF THE CASE	3
REASONS FOR NOT GRANTING THE WRIT	5
I. THE EIGHTH CIRCUIT'S DECISION FINDING THAT COKELEY'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE HE WAS CONVICTED OF A CRIME FOR WHICH HE WAS NOT CHARGED IS CONSISTENT WITH THE DECISIONS OF THIS COURT.	
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:	Page:
Browning v. State, 274 Ark. 13, 621 S.W.2d 688 (1981)	7
Clayborn v. State, 278 Ark. 533, 647 S.W.2d 425 (1983)	6
Cokeley v. State, 288 Ark. 349, 705 S.W.2d 425 (1986)	5
Goodloe v. Parratt, 605 F.2d 1041 (8th Cir. 1979)	8
Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887 (1974)	8
Jackson v. Virginia, 443 U.S. 307 (1979)	5
Missouri v. Hunter, 464 U.S. 78 (1983)	9
Presnell v. Georgia, 439 U.S. 14 (1978)	5
Thornhill v. Alabama, 310 U.S. 88 (1940)	5
Wood v. State, 287 Ark. 203, 697 S.W.2d 884 (1985)	7

STATEMENT OF THE CASE

It is not known for what offense the Respondent, **DICKIE COKELEY ("COKELEY")**, was convicted. He was charged by information of the offense of rape by engaging in sexual intercourse by forcible compulsion. Without the benefit of an amendment to that information, the jury was instructed on an additional offense, the crime of rape by deviate sexual activity. Since the jury convicted him by returning a general verdict, it is impossible to know whether Cokeley was convicted of an offense that he was charged or one which he was not charged.

At the time of Cokeley's conviction, there were two (2) separate and distinct crimes of rape: rape by forcible sexual intercouse; and rape by deviate sexual activity. In affirming his conviction, the Arkansas Supreme Court specifically overruled existing Arkansas law, and ruled that there was only one crime of rape with two methods of commission. The Arkansas Supreme Court then retroactively applied this new ruling to Cokeley even though this was not the law at the time he was charged and convicted.

After his Petition for Rehearing Before the Arkansas Supreme Court and Petitions for Writ of Certiorari to this Court were denied, Cokeley filed a Petition for Writ of Habeas

Corpus with the United States District Court for the Eastern District of Arkansas. Cokeley's principal point for grant of Writ of Habeas Corpus was that he was denied due process because he was convicted of a crime for which he was not charged. The District Court denied the writ. On appeal the Eighth Circuit Court of Appeals reversed, finding that Cokeley's due process rights were violated because he was convicted of a crime for which he was not charged.

REASONS FOR NOT GRANTING THE WRIT

I.

THE EIGHTH CIRCUIT'S DECISION FINDING THAT COKELEY'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE HE WAS CONVICTED OF A CRIME FOR WHICH HE WAS NOT CHARGED IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

It has long been the law that one cannot be convicted of a crime with which he was not charged. The Eighth Circuit did not ignore precedent or break new ground. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Presnell v. Georgia*, 439 U.S. 14 (1978); and *Thornhill v. Alabama*, 310 U.S. 88 (1940). The Eighth Circuit merely upheld this historic Anglo-American principle in finding that Cokeley's due process rights were violated when he was convicted of a crime with which he was not charged. Affirmance of such a well-established principle does not give rise to certiorari.

In an attempt to gain review, the Petitioner makes several misstatements. Contrary to the Petitioner's assertions, Cokeley did seek a rehearing before the Arkansas Supreme Court. It was denied April 21, 1986. See *Cokeley v. State*, 288 Ark. 349, 705 S.W.2d 425 (1986). The Petitioner is wrong in its assertion that Cokeley did not raise this issue. He has always maintained that his due process rights were violated because he was convicted of a crime with which he was not charged. See Petitioner's Appendix, p. C-2. The District

Court found no waiver and found that Cokeley exhausted his available state remedies.

Cokeley was charged with one crime, rape by sexual intercourse. Without the benefit of an amendment to the information, the jury was instructed on two separate crimes: rape by deviate sexual activity; and rape by sexual intercourse. He was convicted by a general verdict and sentenced to 40 years. It is impossible to determine if he was convicted of a crime for which he was not charged or a crime with which he was charged. This is a clear violation of due process.

At the time of Cokeley's trial and conviction, rape by deviate sexual activity and rape by sexual intercourse were two distinct and separate crimes. *Clayborn v. State*, 278 Ark. 533, 647 S.W.2d 433 (1983). Cokeley was charged with one crime, rape by sexual intercourse. The jury was instructed on two crimes, rape by sexual intercourse and rape by deviate sexual activity. To affirm Cokeley's conviction, the Arkansas Supreme Court had to state "we were wrong and overrule *Clayborn*" and apply this new definition of rape to Cokeley. See *Cokeley v. State*, 288 Ark. @ 351, 705 S.W.2d @ 426. After the *Cokeley* decision, there was one crime of rape with two ways of commission. The problem is that Cokeley was convicted

of a crime which he was not charged. Under the law as it existed at the time of his conviction, there were two separate crimes of rape: rape by sexual intercourse and rape by deviate sexual activity. Cokeley was convicted of a separate and distinct crime from that which he was charged, which is a clear denial of Cokeley's due process rights.

The Petitioner argues that the change in the Arkansas rape statute was foreseeable. It relies upon two cases: *Wood v. State*, 287 Ark. 203, 697 S.W.2d 884 (1985); and *Browning v. State*, 274 Ark. 13, 621 S.W.2d 688 (1981). The *Wood* case cannot have any bearing on the issue of foreseeability since it was decided after Cokeley was convicted. Cokeley was convicted on April 17, 1985, and *Wood* was decided on October 21, 1985. Even if the *Wood* case was applicable to analysis of this issue, it is clearly distinguishable. In *Wood*, the State was allowed to amend its information and charge the defendant with two crimes: rape by sexual intercourse; and rape by deviate sexual activity. At the time of the *Wood* decision, the State still recognized two distinct and separate crimes. The issues addressed in *Clayborn* were not raised in *Wood*. The *Wood* case did not even mention or attempt to distinguish *Clayborn*. *Browning v. State* dealt with evidentiary issues.

That case did not go to the jury on a crime not charged. Cokeley's case did.

There is nothing in the record to support the Petitioner's assertion that Cokeley was aware that the alleged victim would testify that she had been raped by means of sexual intercourse and rape by means of deviate sexual activity in advance of trial. The record indicates otherwise. The only notice Cokeley had was the information which charged him with one crime, rape by sexual intercourse. The requirement of notice "is implemented primarily by the charging paper which contains the elements of the offense so as to fairly inform a defendant of the charge which he must defend." *Goodloe v. Parratt*, 605 F.2d 1041, 1045 (8th Cir., 1979) [citing *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887 (1974)]. At trial, Cokeley was not prepared to defend against the crimes. He was on notice only of the crime charged in the indictment.

The Petitioner cites no decision of the United States Supreme Court which requires this Court to follow a State Court decision which violated a person's due process rights by convicting him of a crime for which he was not charged. The Petitioner argues that this Court is bound by the State Court's decision and *Cokeley v. State, supra*, redefining the

Arkansas rape statute and applying this new definition to Cokeley. The Eighth Circuit was not bound by such a decision. Federal courts are not bound to give constitutional effect to state court construction when the effect of such construction results in deprivation of constitutional rights. See *Missouri v. Hunter*, 464 U.S. 78 (1983). The fact is that Cokeley was convicted of a crime for which he was not charged. His due process rights were violated. The cases relied on by the Petitioner are not applicable to the case. The Petitioner's cases deal with application of procedural issues, application of which do not affect constitutional rights. A federal court will be bound by Arkansas' construction of the rape statute as set forth in the *Cokeley* case in the future. It is the application of that decision to the Respondent which is constitutionally prohibited because it results in Respondent being convicted of a crime with which he was not charged.

CONCLUSION

The Eighth Circuit's decision in *Cokeley* does not represent a departure from well-established constitutional principles. This Court simply affirmed an ancient Anglo-American legal principal, that one cannot be convicted of a crime with which he was not charged. Cokeley was convicted of a crime that he was not charged with, and the Eighth Circuit properly granted *habeas* relief. The decision was consistent with decisions of this Court. The situation which gave rise to *habeas* review is isolated and given the affirmance of a long-established constitutional principle, not worthy of review by this Court. The State's petition should be denied.

Respectfully submitted:

DICKIE COKELEY, RESPONDENT

BY: _____

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CERTIFICATE OF SERVICE

I, **DANIEL R. CARTER**, attorney for Respondent, Dickie Cokeley, do hereby certify that I have forwarded two (2) copies of the foregoing Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, by U. S. Mail, first class postage prepaid, to: Olan Warren Reeves, Sr. Assistant Attorney General, Suite 200, 323 Center Street, Little Rock, AR 72201, (501) 682-8078, on this 17th day of June, 1992. All parties required to be served have been served.

DANIEL R. CARTER